

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Appellant,

v.

ARTHEL FORD HARRIS,

Respondent.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Philip D. Heagney, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of the City of St. Louis that quashed an indictment charging Respondent Arthel Ford Harris with unlawful possession of a firearm in violation of section 571.070, RSMo, and dismissed the case with prejudice, on the basis that application of the statute to the Respondent violated the prohibition against *ex post facto* laws contained in article I, section 13 of the Missouri Constitution. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004). This appeal involves the validity of a state statute, section 571.070, RSMo. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

A grand jury in the City of St. Louis returned an indictment against Respondent Arthel Ford Harris on January 4, 2012, charging him with a single count of the class C felony of unlawful possession of a firearm, in violation of section 571.070, RSMo. (L.F. 6). The indictment alleged that on or about November 13, 2011, Harris knowingly possessed a .38 caliber revolver. (L.F. 6). The indictment further alleged that Harris had been convicted on December 27, 2001, in the Circuit Court of Dunklin County of the felony of Distribution/Delivery/Manufacture of a Controlled Substance. (L.F. 6).

Harris filed a motion on July 25, 2012, to quash the indictment. (L.F. 23-24). The motion alleged that section 571.070, RSMo was unconstitutional as applied to Harris because it was a law retrospective in its application and an *ex post facto* law. (L.F. 23). Harris filed supporting suggestions in which he argued that, prior to a 2008 amendment to section 571.070, RSMo, the statute only prohibited the possession of firearms by persons convicted of dangerous felonies, which were defined as murder, forcible rape, assault, burglary, robbery, kidnapping, or the attempt to commit any of those

offenses.¹ (L.F. 25). Harris argued that when he was convicted in 2001 of Distribution/Delivery/Manufacture of a Controlled Substance, that conviction would not have prevented him from possessing a firearm since that charge was not one of the enumerated dangerous felonies.² (L.F. 25). The suggestions put forth arguments about why application of section 571.070, RSMo violated the ban on retrospective laws contained in article I, section 13 of the Missouri Constitution, but no arguments about why it constituted an *ex post facto* law. (L.F. 25-27). The State filed suggestions citing federal cases that found no *ex post facto* violation in the application of weapons statutes to defendants who committed the predicate offense prior to the enactment of the statute. (L.F. 36-37).

The trial court granted the motion to quash on October 23, 2012, and dismissed the indictment with prejudice. (L.F. 48-55). The court concluded

¹ See § 571.070.1(1), RSMo 2000. The present version of the statute, which is identical to what was in effect when Harris was charged, prohibits the knowing possession of a firearm by a person who has been convicted of any felony. § 571.070.1(1), RSMo Cum. Supp. 2012.

² The State concedes that the controlled substance statute under which Harris was convicted in 2001 was never a dangerous felony as defined by statute.

that the ban on retrospective laws contained in Missouri's Constitution referred exclusively to civil rights and remedies and was not applicable to the criminal statute under which Harris was charged. (L.F. 51). The court then considered whether application of the statute to Harris would constitute an *ex post facto* violation. (L.F. 54).

The court concluded that application of the statute to Harris was an *ex post facto* violation because it made the punishment for his initial crime of Distribution/Delivery/Manufacture of a Controlled Substance more burdensome after its commission. (L.F. 52). The court also stated that because application of section 571.070, RSMo violated the prohibition against *ex post facto* laws contained in the Missouri Constitution, the federal cases cited by the State that construed the same clause of the United States Constitution were irrelevant. (L.F. 54-55).

POINT RELIED ON

The trial court erred in dismissing Count III of the felony complaint filed against Respondent Arthel Ford Harris because the statute under which Harris was charged, section 571.070, RSMo, was not an *ex post facto* law as applied to him, in that the statute sought to prohibit and punish his conduct of possessing a firearm after the effective date of the statutory enactment that made such possession illegal. The trial court further erred in ignoring cases construing similar claims raised under federal law, as the prohibitions against *ex post facto* laws in the Missouri and United States Constitutions are co-extensive and construed consistently with each other.

Calder v. Bull, 3 U.S. (Dall.) 386 (1798).

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006).

United States v. Mitchell, 209 F.3d 319 (4th Cir. 2000)

United States v. Pfeifer, 371 F.3d 430 (8th Cir. 2004).

Section 571.070, RSMo Cum. Supp. 2010.

Mo. Const. art. I, § 13.

U.S. Const. art. I, § 10.

ARGUMENT

The trial court erred in dismissing Count III of the felony complaint filed against Respondent Arthel Ford Harris because the statute under which Harris was charged, section 571.070, RSMo, was not an *ex post facto* law as applied to him, in that the statute sought to prohibit and punish his conduct of possessing a firearm after the effective date of the statutory enactment that made such possession illegal. The trial court further erred in ignoring cases construing similar claims raised under federal law, as the prohibitions against *ex post facto* laws in the Missouri and United States Constitutions are co-extensive and construed consistently with each other.

A. Standard of Review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed to be valid and will not be found unconstitutional unless it clearly contravenes a constitutional provision. *Id.* The person challenging the statute's validity bears the burden of proving that the act clearly and undoubtedly violates the constitution. *Id.*

B. Analysis.

The trial court made two errors in finding that section 571.070, RSMo was an *ex post facto* law as applied to Harris. Those errors were the

determination that the statute made the punishment for Harris's prior drug offense more burdensome, and the determination that the *Ex Post Facto* Clause of the United States Constitution has no application, thus making irrelevant the numerous federal cases holding that similar felon in possession statutes are not *ex post facto* laws.

The ban on *ex post facto* laws contained in the Missouri Constitution is co-extensive with the ban on *ex post facto* laws contained in the United States Constitution. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006), *see*, U.S. Const. art I, § 10, Mo. Const. art. I, § 13. This Court thus interprets the two prohibitions consistently. *Phillips*, 194 S.W.3d at 841. Contrary to the trial court's conclusion, federal cases construing the *Ex Post Facto* Clause in the United States Constitution are strongly persuasive in construing the like provision of the Missouri Constitution. *Id.*

The United States Supreme Court has defined an *ex post facto* law as one that: (1) makes an action, done before the passing of the law, and which was innocent when done, criminal and punishes such action; (2) aggravates a crime or makes it greater than it was when committed; (3) inflicts a greater punishment than was annexed to the crime when committed; or (4) alters the rules of evidence to require less or different testimony to convict the offender than was required at the time of the commission of the offense. *Calder v. Bull*, 3 U.S. (Dall.) 386, 390-91 (1798). This Court has adopted that same

definition. *Ex parte Bethurum*, 66 Mo. 545, 548-49 (1877), *see also*, *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005) (describing an *ex post facto* law as one that provides for punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed).

The trial court, in its Judgment, provided a slightly different definition of an *ex post facto* law that described the second category of such laws as those that make punishment of a crime more burdensome after its commission. It was that provision that the court found was violated by the 2008 change to section 571.070.1(1), RSMo. The language about making a punishment more burdensome originates from the concluding paragraph of *Collins v. Youngblood*, 497 U.S. 37, 52 (1990), a case where the Supreme Court reaffirmed the *Calder v. Bull* definition of *ex post facto* laws and overruled subsequent cases that had expanded the *Calder* categories. *Id.* at 50-52.³ The Court also noted that the original understanding of the *Ex Post Facto* Clause was that legislatures may not retroactively alter the definition

³ The Court has subsequently cited to *Youngblood* in two other cases where it again reaffirmed the *Calder* definition of *ex post facto*. *Carmell v. Texas*, 529 U.S. 513, 538, 539 (2000); *Stogner v. California*, 539 U.S. 607, 611-12 (2003).

of crimes or increase the punishment for criminal acts. *Id.* at 43. It thus appears from a complete reading of *Collins* that the phrase “more burdensome” in connection with punishments carries the same meaning as increasing the punishment for a crime after it is committed.

Federal courts have construed felon in possession laws and found that they did not increase the punishment for the defendant’s prior felonies that occurred prior to enactment of the felon in possession statute. *See, e.g., United States v. Pfeifer*, 371 F.3d 430, 436-37 (8th Cir. 2004); *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Boyd*, 52 F. Supp.2d 1233, 1236-37 (D. Kan. 1999); *United States v. Meade*, 986 F. Supp. 66, 69 (D. Mass. 1997). As the Seventh Circuit has noted, the federal felon in possession statute does not punish a person solely for his or her status as a convicted felon. *Hemmings*, 258 F.3d at 594. The statute instead punishes defendants for the act of possessing a firearm after the effective date of the felon in possession statute. *Boyd*, 52 F. Supp.2d at 1237; *Meade*, 986 F. Supp. at 69. Other courts have used that theory of post-enactment conduct to reject *ex post facto* challenges to the application of felon in possession laws to defendants whose underlying convictions predated those statutes. *See, e.g., United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000); *United States v. Brady*, 26 F.3d 282, 290-91 (2d Cir. 1994), *cf., United States v. Ross*, 917 F.2d 997, 998 (7th Cir. 1990) (conviction for illegal possession of an

unregistered firearm was not *ex post facto* even though defendant possessed the weapon prior to amendment of the statute).

The *Mitchell* case, like this case, involved a statutory amendment that post-dated the prior conviction that served as the predicate offense to the felon in possession charge. The defendant purchased a handgun in February 1996 and was convicted in June of that year of misdemeanor assault and battery for assaulting his wife. *Mitchell*, 209 F.3d at 321. On September 30, 1996, Congress amended the Gun Control Act of 1968 to make it illegal for a person convicted of a misdemeanor crime of domestic violence to possess a firearm or ammunition. *Id.* In July of 1998, the defendant's wife told police that the defendant had threatened her, and that he owned a handgun. *Id.* The defendant was tried and convicted later that year of illegally possessing a firearm. *Id.* The Fourth Circuit rejected the defendant's *ex post facto* challenge, finding that the conduct prohibited by the statute was the possession of a firearm, so that possession occurring after the statute's enactment did not run afoul of the *ex post facto* prohibition, even if the purchase of the firearm and the predicate conviction both occurred prior to the statute's enactment. *Id.* at 322-23.

While the United States Supreme Court has not addressed the issue of an *ex post facto* violation in relation to a felon in possession law, it has rejected an *ex post facto* challenge in a different context by applying the same

principles relied on by the lower federal courts cited above. In *Samuels v. McCurdy*, a Georgia sheriff seized liquor from the plaintiff's home under a statute enacted in 1917 that made possession of liquor illegal and declared such liquor subject to confiscation and destruction. *Samuels v. McCurdy*, 267 U.S. 188, 190-92 (1925). The plaintiff raised an *ex post facto* claim because the seized liquor had been legally purchased prior to the enactment of the 1917 law. *Id.* In rejecting the argument, the Supreme Court stated that the statute did not fix a penalty for the plaintiff coming into possession of the liquor, but instead imposed a penalty for continuing to possess the liquor after the enactment of the law. *Id.* at 193.

Application of the principles set out above shows that the indictment against Harris did not violate the *Ex Post Facto* Clauses of either the Missouri or United States Constitutions. The indictment did not attempt to criminalize conduct that was innocent when committed, since he was charged for possessing a firearm after the effective date of the statutory amendment making such possession by him illegal. The charge also did not seek to punish Harris for his previous conviction on drug charges. Any punishment that Harris would receive if convicted on the felon in possession charge would be for his conduct following enactment of the law making it illegal for him to possess a firearm.

The circuit court erred in quashing the indictment and dismissing the charge with prejudice on the basis of an *ex post facto* violation. This Court should reverse the circuit court's judgment and reinstate the indictment.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment quashing the indictment and dismissing with prejudice the felony charge filed against Respondent Arthel Ford Harris should be reversed and the case should be remanded to the trial court for reinstatement of the indictment and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 2,670 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and
2. That a copy of this notification was sent through the eFiling system on this 2nd day of May, 2013, to:

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